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SUBJECT: PRESIDENT SIGNS VISA WAIVER PROGRAM REFORM LAW

REF: 2006 STATE 191878

11. Summary and Introduction. Department would like to applaud posts for continued outstanding efforts in managing the VWP issue from both a policy and public diplomacy perspective. This cable provides guidance for use in responding to questions about amendments to the Visa Waiver Program, as made by H.R. 1 "Implementing Recommendations of the 9/11 Commission Act of 2007," known colloquially as the "9/11 Bill," which the President signed into law on August 3. The amendments, which will affect both current and prospective VWP member countries, significantly enhance the security elements of the program - including requirements for an Electronic Travel Authorization system, an exit system, and enhanced information sharing - while adding limited waiver authority for countries that meet all security requirements, but do not meet the law's standard for visa refusal rates. While these modifications are a positive step towards the goal of modernizing the VWP that the President set forth in November 2006 in Tallinn, Estonia, they fall short of the needed flexibility with respect to visa refusal rates sought by the Administration to accelerate the entry into VWP of some of our closest allies. In a statement released as the bill was signed, the President recognized the modifications as a step forward, especially on security, but expressed his intention to continue working with Congress to gain greater flexibility for program expansion.

12. In addition to background material and talking points on the VWP reform effort contained in reftel, embassies and consulates may draw upon the information below to discuss the VWP reform legislation with appropriate officials and in responding to press and public inquiries. Although the language of the law is not specific with respect to countries, the target "prospective members" of the VWP include the existing roadmap members of EU countries not currently participating, and the Republic of Korea. (For a list of current VWP participant countries, visit [www.travel.state.gov/visa](http://www.travel.state.gov/visa)). End Summary and Introduction.

13. The President announced his twin policy goals for the VWP - strengthening security and accelerating admission prospects for some of our closest allies - in Tallinn, Estonia, on November 28, 2006. Shortly thereafter, the Administration began working with Congress on a legislative proposal to modernize the VWP. VWP reform legislation was ultimately proposed in the Senate as part of the implementation of the 9/11 Commission recommendations, and was agreed in Conference in July. On August 3, 2007, the President signed the bill into law.

¶4. The new law incorporates security enhancements to the program strongly supported by the Administration. Modernization of the VWP, as the legislation states, will "enhance bilateral cooperation on critical counterterrorism and information sharing initiatives; support and expand tourism and business opportunities to enhance long-term economic competitiveness; and strengthen bilateral relationships." The legislation provides for limited flexibility on visa refusal rates, a step forward but well short of the Administration's goal. In a Presidential statement released upon the bill signing, the President said, "I also appreciate the steps taken to modernize the Visa Waiver Program, particularly the additional security measures, but I will continue to work with Congress to advance our security and foreign policy objectives by allowing greater flexibility to bring some of our closest allies into the program."

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Enhanced Security Features  
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¶5. The legislation (contained in Title VII-Strengthening Efforts to Prevent Terrorist Travel, Section 711-Modernization of the Visa Waiver Program) adds a number of new or enhanced security measures to the VWP that facilitate the identification of passengers who may pose a threat or are otherwise of interest and are seeking to travel to the United States. Overall, these new security measures will transform the VWP from a program that looks for security threats on a country-by-country basis into one that can screen for security risks on a passenger-by-passenger basis. These measures include:

-- An Electronic Travel Authorization (ETA) System: The  
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ETA system will collect basic biographic information about passengers who intend to travel to the United States under the VWP. The Department of Homeland Security (DHS) will use the data to determine whether travelers are eligible to travel under the VWP and whether they are potential threats - e.g., by comparing names against watchlists of known and suspected terrorists. We envision that travelers will be able to submit ETA applications over the Internet or through other means. Passengers will pay a nominal fee, and the system will return a quick response. Travelers whose ETA applications are denied cannot travel under the VWP but are not/not necessarily ineligible to travel to the U.S. An ETA denial requires that the traveler apply for and obtain a visa; these travelers will be referred to a consulate to apply for a visa. Approval under the ETA can be valid up to 3 years. Eventually, the ETA will make it unnecessary for VWP travelers to complete Forms I-94W, which typically are filled out aboard U.S.-bound aircraft. It is important to note that an ETA is not a visa and does not meet the legal requirements to serve as a substitute for a U.S. visa. The ETA system is still under development, but is expected to begin operating in 2008.

-- Reporting of Lost and Stolen Passports: VWP passports are a valuable commodity for terrorists seeking to infiltrate the U.S. It therefore is essential to have complete and timely information about VWP travel documents that have gone missing. The new legislation calls on VWP members to enter into agreements with the United States "to report, or make available through Interpol or other means as designated by the Secretary of Homeland Security, to the United States Government information about the theft or loss of passports within a strict time limit and in a manner specified in the agreement."

-- Passenger Information Exchange: Information exchange is an essential component of U.S. counterterrorism policy. The law calls for VWP members to enter into agreements with the United States to share information to assist in determining whether U.S.-bound passengers pose a security threat.

-- Repatriation: VWP countries must accept citizens for repatriation no more than three weeks after a U.S. court issues a final order of removal.

16. In the context of determining whether to waive a country into the VWP under the Administration's new waiver authority for countries that do not meet the existing 3 percent statutory visa refusal rate [see paras 8 - 12 below], the new law also specifies that the Secretary of Homeland Security, in consultation with the Secretary of State, shall take into consideration other factors affecting the security of the United States, including:

-- Airport Security in the Country: DHS could, for example, ask VWP members to enhance security standards, i.e. through consideration of security background checking and credentialing procedures for airport employees in the country, or degree of restrictions on access to secure areas at airports to appropriate personnel.

-- Whether the Country Assists in the Operation of an Effective Air Marshal Program: DHS could propose, for example, that U.S. Federal Air Marshals be permitted to carry weapons while operating on flights to, from, or over the U.S.; expansion of the presence of Federal Air Marshals on foreign air carriers, or deployment of VWP members' own air marshal services.

-- Standards for Passports and Travel Documents in the Country: Under current law, VWP participants have been required to transition to machine readable biometric passports. Under the new law, DHS could consider the security of travel documents issued by the country. Examples include issuance of passports by central (rather than regional or local) authorities and tougher standards for emergency or temporary passports.

-- Other security-related factors, including the country's cooperation with U.S. initiatives to combat terrorism and the country's cooperation with the U.S. intelligence community in sharing information regarding terrorist threats.

The Department of Homeland Security will also work with current VWP members on implementing these discretionary

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security measures.

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Exit system  
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17. The new legislation requires DHS to put in place a system that can verify the departure of at least 97 percent of foreign visitors who leave the U.S. by air. Initially, the system would be based on biographic data, such as travelers' names and passport numbers. (DHS expects it will be able to achieve the 97 percent target using biographic information within 6-12 months.) Biometric information, such as fingerprints, will be required by June 30, 2009. If this deadline is not met, Administration authority to waive the 3 percent visa refusal rate requirement will be suspended until the Administration certifies that a biometric exit program is in place.

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Visa refusal rates  
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¶8. The requirement for a visa refusal rate of less than 3 percent remains in the law, but new authority has been added to waive those provisions. This waiver authority is conditioned on a number of factors including adoption of the enhanced security measures, counterterrorism cooperation and sustained reduction of visa refusal rates. The waiver will allow only countries with visa refusal rates of not more than 10 percent in the previous fiscal year to be considered for the waiver, or alternatively, countries with an overstay rate (see para 12) below a maximum level to be established by DHS and the Department of State. As noted above, DHS must also meet the air exit standards in the law and have an ETA in place before the waiver authority can be exercised.

¶9. While a step forward, the waiver provisions in the new law do not provide the degree of flexibility sought to meet the President's goals for expanding membership in the program. The Administration will continue to work with Congress to bring needed flexibility to the VWP.

¶10. For countries below the 10 percent refusal rate threshold: Washington is already working with many of the roadmap countries to clarify procedures on the new security requirements. We will keep posts informed as the process advances.

¶11. For countries above the 10 percent refusal rate: The Administration is committed to work with Congress to gain additional flexibility on refusal rate criteria. Meanwhile, roadmap countries should seek to implement the new security measures and continue their efforts to reduce refusals and overstays.

¶12. Overstay rates: As an alternative to the 10 percent visa refusal rate standard, the new legislation allows the Administration to waive the 3 percent visa refusal rate requirement if a country's visa overstay rate did not exceed the maximum visa overstay rate to be established by State and DHS. These rates are yet to be established and, according to the conference report, should "reflect a reasonable expectation" that the country can meet existing statutory criteria for continued participation. Calculation of the overstay rate will require exit data that is not yet available and will be based on overstays by nationals of the country. We will keep posts apprised of developments in these area, which could, in practical terms, enable the Administration to exercise its waiver authority for some countries above the 10 percent refusal rate threshold.

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Rolling out the changes: new and existing members  
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¶13. The new security elements impose additional requirements both on VWP countries and on the United States. We will not ask other countries to do what we are not willing and able to reciprocate. The VWP amendment includes security provisions that apply to all current member countries. Uniform security standards are essential because the threat of global terrorism is not confined to particular corners of the globe. Countries seeking to join the VWP will have to comply with the new security measures before they are admitted into the program. For current VWP members, although the new security requirements are effective immediately, transition periods, which may cover the next few years, are anticipated to allow for their implementation, and VWP

country travelers will not see any immediate changes. The requirements and their implementation will form part of discussions when current members are up for their regular biannual reviews.

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Roadmaps and Consular Working Groups  
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¶14. The United States will consult closely both with current and prospective VWP partner governments as we move forward in implementing these critically necessary improvements to the VWP program.

¶15. For prospective VWP members/roadmap countries, especially those where very high current visa refusal rates effectively exclude them from consideration for membership, it is especially critical that we continue to work together and make full use of the Consular Working Groups, as a means to convey the new security requirements to host countries and work on ways to meet these requirements and to continue to reduce rates of refusals and overstays.

¶16. The new legislation falls short of European Union hopes that a change in law would open up the program to all 27 EU members (all of whom extend visa waiver benefits to U.S. citizens). While the United States wanted greater authority to expand the program and would be happy to welcome all qualifying EU member states into the program, each country must satisfy the program requirements set by law as the United States makes decisions about visa requirements on a country-by-country basis. The EU has also expressed unhappiness about the new security requirements being applied to existing VWP members. As expressed in recent letters from European Commissioner for Justice and Home Affairs Frattini and Portuguese Interior Minister Pereira to the 9/11 bill conferees, the EU believes existing member states meet most of the requirements of the new law. DHS is preparing a response to those letters, and indicates there are a number of issues still to be discussed including passenger information exchange and air marshal programs. Building on visits to Hungary, Greece, Latvia, and Korea, DHS intends to continue its consultations on the new security measures with prospective member countries. DHS and State will also be briefing Washington embassies to discuss details and implications of the new legislation.

¶17. Department is ready to provide any additional guidance that is requested. Points of contact are: EUR/PGI Ivan Weinstein; EUR/ERA Alessandro Nardi; CA/VO John Brennan; and DHS Dan Sullivan.  
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